# Delta-Pelita Sebakong Sdn Bhd v Wong Hou Lianq & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-02(NCvC)(W)-22–01 OF 2018, Q–02(NCvC)(W)–90–01 OF 2018 AND Q-02(IM)(NCvC)-2001–09 OF 2018

BADARIAH SAHAMID, RHODZARIAH BUJANG AND NOR BEE ARIFFIN JJCA

11 FEBRUARY 2020

*Contract — Termination — Wrongful termination — Defendant appointed plaintiff to maintain oil palm estate — Defendant later notified plaintiff it had undergone management change and required plaintiff to 'hand over' all matters to defendant's representative to ensure smooth transition — Plaintiff regarded notice as termination of contract and vacated estate — Whether defendant by conduct wrongfully repudiated contract resulting in unlawful termination — Whether plaintiff was not at fault — Whether plaintiff was entitled to general and special damages it suffered as a result of the termination*

Pursuant to an agreement dated 8 April 2010, Delta-Pelita Sebakong Sdn Bhd ('Delta') appointed Golden Cash Harvest Sdn Bhd ('Golden') to carry out maintenance works on its oil palm plantation for a period of five years. On 6 August 2013, Delta sent a letter ('the 6 August 2013 letter') to Golden stating that from 16 August 2013 Delta's affairs would be taken over by a new management and Golden was to 'hand over all matters to the Senior General Manager to ensure a smooth transition'. Golden notified Delta that it regarded Delta's letter as a termination of the agreement and informed Delta that it would vacate the plantation together with its staff, workers, machinery and equipment on 16 August 2013. In response, Delta warned Golden that if it vacated the plantation, Golden would be terminating the agreement without just cause and it would be liable for all losses and damages that Delta would suffer as a result (August 2013 was the peak harvesting season for the estate). Golden did vacate the plantation as it promised and then sued Delta for a declaration that Delta had, by the 6 August 2013 letter, wrongfully terminated the agreement. Golden sought RM14,541,214.91 as general damages for, inter alia, work done, reimbursement claims and loss of contract fees for the unexpired term of the agreement. It also claimed various sums as special damages including compensation and lay-off benefits paid to local and foreign workers, cost of removing equipment and machinery from the estate, compensation paid to staff for early termination and costs incurred to secure working permits. Delta counterclaimed against Golden and its two shareholders, Neil Wong and his mother, Kathryn Ma (the first and second respondents in Delta's appeal herein) for, inter alia, damages for unlawful

abandonment of the plantation and loss of revenue from the sale of oil palm fresh fruit bunches. Delta also sought general and exemplary damages against Neil Wong and his father, Wong Kie Nai (who were then both directors of Delta) for breaching their duties of disclosure and fiduciary duties under ss 131 and 132 of the Companies Act 1965 ('the CA'). Delta sought an order that the agreement be rescinded and/or declared null and void; alternatively, that Neil Wong and Kathryn Ma be held personally responsible for the damages claimed against Golden in the counterclaim. Neil Wong and Kathryn Ma had signed the agreement on behalf of Golden while Wong Kie Nai and his brother (Wong Kie Yik, who was also a director in Delta) had signed for Delta. Kathryn Ma was also sued in these proceedings as the executrix and trustee of the estate of Wong Kie Nai, whose death on 11 March 2013 caused a falling-out between the parties in this action and also caused Wong Kie Yik and his sons to wrest control of the group of companies to which Golden and Delta belonged. The breach of statutory duties alleged against Neil Wong and Wong Kie Nai was that they had failed to disclose to the board of directors of Delta their interests in the maintenance contract that was awarded to Golden and that they had thereby put themselves in a conflict-of-interest situation. The instant appeals were against the High Court's allowing of both the claim and the counterclaim in part. Specifically, the trial court held that: (a) Golden had breached the agreement by wrongfully and unilaterally abandoning Delta's plantation and consequently could not claim any damages; (b) Golden's special damages claims for RM699,748 (for early termination compensation to workers), RM112,220 (cost of repatriating foreign workers) and RM53,722 (costs to demobilise equipment and machinery) could not be allowed; (c) Delta did not terminate or breach the agreement; (d) apart from RM10,000 as nominal damages Delta was not entitled to any other damages because its failure to mitigate its losses and damages; (e) Neil Wong and Wong Kie Nai had breached their duty of disclosure under s 131 of the CA but not their fiduciary duties under s 132 of the CA; (f) despite Golden's breaches, Delta had treated the agreement as valid and therefore was estopped from challenging its validity; and (g) the documentary evidence showed Delta had admitted Golden's claim of RM14,541,214.91; however, from that sum, all amounts claimed by Golden under 'debit memos' had to be deducted. Inter alia, Delta appealed against: (i) the dismissal of its claims for damages and the award of RM10,000 as nominal damages; (ii) the finding that it had failed to mitigate its losses and damages; and (iii) the finding that Neil Wong and Wong Kie Nai had not breached their fiduciary duties under s 132 of the CA. Inter alia, Golden appealed against the finding that: (1) it had breached the agreement and was not entitled to any damages; (2) all sums under Golden's debit memos (amounting to RM2.4m) had to be deducted from its RM14.5m claim; and (3) Neil Wong and Wong Kie Nai had breached their duties of disclosure under s 131 of the CA.

**Held**, unanimously dismissing Delta's appeal and allowing Golden's appeals

(but affirming the trial court's finding that Neil Wong and Wong Kie Nai had breached their duties of disclosure under s 131 of the Companies Act 1965):

(1) There was wrongful repudiation of the agreement by Delta which resulted in an unlawful termination of the agreement through no fault of Golden. There was totally no justification for Delta to have issued the 6 August 2013 letter asking Golden to 'hand over all matters to the Senior General Manager to ensure a smooth transition'. If it was true that Delta intended Golden to continue with the maintenance contract, why was there a need for that 'handing over'? The factual matrix forming the background of the transaction viewed objectively was irrefutable evidence that Golden was not just responsible for maintenance but was managing the plantation when Wong Kie Nai was still alive. Taken against that backdrop, the 6 August 2013 letter clearly implied that the management of the plantation was in Golden's hands. Delta's stand that the said letter was not a termination and that the maintenance agreement still subsisted flew in the face of the clear intention expressed in the said letter (see paras 24, 29 & 33–34).

(2) Golden had adduced sufficient proof for its claims for special damages of RM699,748 (to compensate workers for early termination of the agreement) and RM112,220 (as costs incurred to repatriate its Indonesian workers) to be allowed. However, the claim for RM53,722 (for costs incurred in removing equipment and machinery from the plantation) was disallowed as Golden would have incurred that cost in any event when the agreement expired (see paras 35–40).

(3) The general damages sum of RM14,541,214.91 claimed by Golden had to be allowed in full without deduction of the amounts comprised in the debit memos. This was because the amounts in the debit memos were already included in the aforesaid sum. On the documentary evidence, the trial judge correctly found that Delta had admitted that the sum of RM14,541,214.91 was due and owing to Golden. Hence, it was contrary to that finding for the trial court to thereafter order the amounts comprised in the debit memos to be deducted (see paras 41–44).

(4) This court agreed with the trial judge that Neil Wong and Wong Kie Nai had breached their duty of disclosure under s 131 of the CA but not their fiduciary duties under s 132 of the CA as the allegation of breach of fiduciary duty was not proven. Despite the s 131 breach, Delta had chosen to ratify the agreement. A breach of s 131 would not automatically cause a breach of s 132 of the CA (see paras 45–58).

**[Bahasa Malaysia summary**

Berdasarkan kepada perjanjian bertarikh 8 April 2010, Delta-Pelita Sebakong Sdn Bhd ('Delta') telah melantik Golden Cash Harvest Sdn Bhd ('Golden') untuk menjalankan kerja-kerja penyelenggaraan di ladang kelapa sawit untuk

tempoh lima tahun. Pada 6 Ogos 2013, Delta telah menyerahkan surat ('surat 6 Ogos 2013 tersebut') kepada Golden yang menyatakan bahawa bermula 16 Ogos 2013 urusan Delta akan diambil alih oleh pengurusan baru dan Golden akan 'menyerahkan semua perkara kepada Pengurus Besar Kanan untuk memastikan peralihan yang lancar'. Golden memaklumkan Delta bahawa ia menganggap surat Delta sebagai penamatan perjanjian dan memaklumkan Delta bahawa ia akan mengosongkan ladang tersebut bersama dengan kakitangan, pekerja, mesin dan peralatannya pada 16 Ogos 2013. Sebagai maklumbalas, Delta memberikan amaran kepada Golden bahawa jika ia mengosongkan ladang tersebut, Golden akan menamatkan perjanjian tanpa sebab yang munasabah dan akan bertanggungan ke atas semua kerugian dan kerosakan yang akan ditanggung oleh Delta (Ogos 2013 adalah musim puncak penuaian lading tersebut). Golden memang mengosongkan ladang seperti yang dijanjikannya dan kemudian menyaman Delta untuk suatu pengisytiharan bahawa Delta, melalui surat 6 Ogos 2013, telah menamatkan perjanjian dengan salah. Golden meminta RM14,541,214.91 sebagai ganti rugi am, antara lain, kerja yang telah dijalankan, tuntutan pembayaran balik dan kehilangan fi kontrak untuk jangka masa perjanjian yang masih belum tamat. Ia juga menuntut sejumlah wang sebagai ganti rugi khas termasuk pampasan dan pemberhentian pekerja yang dibayar kepada pekerja tempatan dan asing, kos menanggalkan peralatan dan mesin dari hartanah, pampasan yang dibayar kepada kakitangan untuk pemberhentian awal dan kos yang dikeluarkan untuk mendapatkan permit kerja. Delta membuat tuntutan balas terhadap Golden dan dua pemegang sahamnya, Neil Wong dan ibunya, Kathryn Ma (responden pertama dan kedua dalam rayuan semasa Delta) untuk, antara lain, ganti rugi kerana meninggalkan ladang secara tidak sah dan kehilangan hasil dari penjualan kelapa sawit tandan segar. Delta juga menuntut ganti rugi am dan teladan terhadap Neil Wong dan bapanya, Wong Kie Nai (kedua-dua adalah pengarah Delta) kerana melanggar tugas pendedahan dan kewajipan fidusiari mereka di bawah ss 131 dan 132 Akta Syarikat 1965 ('AS tersebut'). Delta memohon suatu perintah agar perjanjian tersebut ditamatkan dan/atau batal dan tidak sah; sebagai alternatif, Neil Wong dan Kathryn Ma bertanggungjawab secara peribadi atas ganti rugi yang dituntut terhadap Golden dalam tuntutan balas. Neil Wong dan Kathryn Ma telah menandatangani perjanjian tersebut bagi pihak Golden sementara Wong Kie Nai dan abang beliau (Wong Kie Yik, yang juga pengarah di Delta) telah menandatangani perjanjian untuk Delta. Kathryn Ma juga disaman dalam prosiding ini sebagai wasi dan pemegang amanah harta pusaka Wong Kie Nai, yang kematiannya pada 11 Mac 2013 telah menyebabkan pertelingkahan antara pihak-pihak dalam tindakan ini dan juga menyebabkan Wong Kie Yik dan anak-anak lelakinya melepaskan pengendalian kumpulan syarikat yang menjadi milik Golden dan Delta. Pelanggaran kewajiban undang-undang yang didakwa terhadap Neil Wong dan Wong Kie Nai adalah kerana mereka gagal untuk mendedahkan kepada lembaga pengarah Delta kepentingan mereka dalam kontrak penyelenggaraan yang diberikan kepada Golden dan dengan itu

A mereka telah meletakkan diri mereka dalam situasi konflik kepentingan. Rayuan semasa adalah terhadap Mahkamah Tinggi yang membenarkan tuntutan tersebut dan sebahagian tuntutan balas. Secara khusus, mahkamah perbicaraan berpendapat bahawa: (a) Golden telah melanggar perjanjian dengan secara salah dan secara unilateral meninggalkan ladang Delta dan
B akibatnya tidak dapat menuntut ganti rugi; (b) Tuntutan ganti rugi khas Golden dengan jumlah RM699,748 (untuk pampasan penamatan awal kepada pekerja), RM112,220 (kos penghantaran balik pekerja asing) dan RM53,722 (kos untuk menanggalkan peralatan dan mesin) tidak harus dibenarkan; (c) Delta tidak menamatkan atau melanggar perjanjian; (d) selain
C RM10,000 untuk ganti rugi nominal Delta tidak berhak mendapat ganti rugi lain kerana kegagalannya untuk mengurangkan kerugian dan kehilangan; (e) Neil Wong dan Wong Kie Nai telah melanggar tugas mereka di bawah s 131 AS tetapi bukan tugas fidusiari mereka di bawah s 132 AS; (f) walaupun
D Pelanggaran Golden, Delta telah menganggap perjanjian tersebut sebagai sah dan oleh itu diestop dari mempertikaikan kesahihannya; dan (g) keterangan dokumentasi menunjukkan Delta telah mengakui tuntutan Golden sebanyak RM14,541,214.91; namun, dari jumlah tersebut, semua jumlah yang dituntut oleh Golden di bawah 'memo debit' terpaksa ditolak. Antara lain, Delta
E mengemukakan rayuan terhadap: (i) pembatalan tuntutan ganti rugi dan pemberian ganti rugi RM10,000 sebagai nominal; (ii) dapatan bahawa ia gagal mengurangkan kerugian dan kehilangan; dan (iii) dapatan bahawa Neil Wong dan Wong Kie Nai tidak melanggar tugas fidusiari mereka di bawah s 132 AS. Antara lain, Golden mengemukakan rayuan terhadap dapatan bahawa: (1) ia
F telah melanggar perjanjian dan tidak berhak mendapat ganti rugi; (2) semua jumlah wang di bawah memo debit Golden (berjumlah RM2.4 juta) terpaksa ditolak dari tuntutan RM14.5 juta; dan (3) Neil Wong dan Wong Kie Nai telah melanggar tugas pendedahan mereka di bawah s 131 AS.

G **Diputuskan**, dengan sebulat suara menolak rayuan Delta dan membenarkan rayuan Golden (tetapi mengesahkan dapatan mahkamah perbicaraan bahawa Neil Wong dan Wong Kie Nai telah melanggar tugas pendedahan mereka di bawah s 131 Akta Syarikat 1965):

H (1) Terdapat penolakan perjanjian yang salah oleh Delta yang mengakibatkan penamatan perjanjian yang tidak sah tanpa kesalahan Golden. Ianya sama sekali tidak ada alasan untuk Delta mengeluarkan surat 6 Ogos 2013 yang meminta Golden untuk 'menyerahkan semua perkara kepada Pengurus Besar Kanan untuk memastikan peralihan yang lancar'. Sekiranya benar bahawa Delta bermaksud Golden untuk
I meneruskan kontrak penyelenggaraan, mengapa ada keperluan untuk 'penyerahan' tersebut? Matriks faktual yang membentuk latar belakang transaksi yang dilihat secara objektif adalah bukti yang tidak dapat dibantah bahawa Golden tidak hanya bertanggungjawab untuk penyelenggaraan tetapi mengurus ladang semasa Wong Kie Nai masih

hidup. Berdasarkan kepada latar belakang tersebut, surat 6 Ogos 2013 dengan jelas menunjukkan bahawa pengurusan ladang berada di tangan Golden. Pendirian Delta bahawa surat tersebut bukanlah penamatan dan bahawa perjanjian tersebut masih wujud berdasarkan kepada niat yang jelas dinyatakan dalam surat tersebut (lihat perenggan 24, 29 & 33–34).

(2) Golden telah mengemukakan bukti yang mengcukupi bagi tuntutannya untuk ganti rugi khas sebanyak RM699,748 (untuk memberi ganti rugi kepada pekerja untuk penamatan awal perjanjian) dan RM112,220 (sebagai kos untuk mengembalikan pekerja Indonesia) dibenarkan. Walau bagaimanapun, tuntutan sebanyak RM 53,722 (untuk kos menanggalkan peralatan dan jentera dari ladang) tidak dibenarkan kerana Golden akan menanggung kos tersebut dalam apa jua keadaan apabila perjanjian tersebut ditamatkan (lihat perenggan 35–40).

(3) Amaun ganti rugi am berjumlah RM14,541,214.91 yang dituntut oleh Golden harus dibenarkan sepenuhnya tanpa pemotongan jumlah yang terkandung dalam memo debit. Ini kerana jumlah dalam memo debit sudah termasuk dalam jumlah tersebut. Berdasarkan keterangan dokumentasi, hakim perbicaraan dengan tepat membuat dapatan bahawa Delta telah mengakui bahawa jumlah wang berjumlah RM14,541,214.91 harus dibayar dan terhutang kepada Golden. Oleh itu, adalah bertentangan dengan dapatan bahawa mahkamah perbicaraan kemudian memerintahkan agar jumlah yang terkandung dalam memo debit dikurangkan (lihat perenggan 41–44).

(4) Mahkamah ini bersetuju dengan hakim perbicaraan bahawa Neil Wong dan Wong Kie Nai telah melanggar kewajiban pendedahan mereka di bawah s 131 AS tetapi bukan tugas fidusiari mereka di bawah s 132 AS kerana dakwaan pelanggaran tugas fidusiari tidak dapat dibuktikan. Walaupun berlaku pelanggaran s 131, Delta telah memilih untuk mengesahkan perjanjian tersebut. Pelanggaran s 131 tidak akan secara automatik menyebabkan pelanggaran s 132 AS (lihat perenggan 45–58).]

**Cases referred to**

*Azman Bin Jufri v Medtronic Australia Pty Ltd* [2015] 6 MLJ 841, HC (refd)
*Beh Chun Chuan v Paloh Medical Centre Sdn Bhd & Ors* [1999] 3 MLJ 262; [1999] 7 CLJ 1, HC (refd)
*Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, FC (folld)
*Bonhaus-Carter v Hyde Park Hotel Ltd* [1948] WN 89, KBD (refd)
*Bristol & West Building Society v Mothew* [1998] Ch 1, CA (folld)
*FAGE UK Ltd and another v Chobani UK Ltd and another* [2014] EWCA Civ 5, HC (refd)
*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ

A 1; [2004] 4 CLJ 309, FC (folld)
*Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237, CA (folld)
*Morello Sdn Bhd v Jacques (International) Sdn Bhd* [1995] 1 MLJ 577, FC (refd)
B *Ranggong ak Jenau & Ors v BLD Resources Sdn Bhd & Ors and another appeal* [2017] 5 MLJ 700; [2017] 5 MLJ 700, CA (refd)
*Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973, HC (refd)
*UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] MLJU 2225; [2010] 9 CLJ 785, FC (refd)
C *Van Rolls Asia Pte Ltd v Goh Boon Gay & Others* [2018] 4 SLR 1053, HC (refd)

**Legislation referred to**

Companies Act 1951 [AUS] s 123
D Companies Act 1965 (repealed by the Companies Act 2016) ss 131, 131(1), (5), (7A), (7B), 132, 132(1), (1A)
Companies Act [SG] s 157(1)
Contracts Act 1950 s 74
Rules of the Court of Appeal 1994 r 8(1)

E

**Appeal from**: Suit No SBW-22NCvC-7/10 of 2013 (High Court, Sibu)

*Alvin Yong (Yong Sie Mee, Shirleen Ong and Liew Sheau Kie with him) (Loke King Goh & Partners Advocates) for the appellant.*
F *Sim Hui Chuang (Lim Lip Sze and Stella Sim with him) (Reddi & Co Advocates) for the respondent.*

**Rhodzariah Bujang JCA:**

G **[1]** The three appeals listed above emanated from a single decision of the learned High Court judge in respect of a claim filed by Golden Cash Harvest Sdn Bhd ('Golden') against Delta-Pelita Sebakong Sdn Bhd ('Delta') and a counterclaim by Delta against Golden, Wong Hou Lianq ('Neil Wong') and Kathryn Ma Wai Fong ('Kathryn Ma'). The claim of Golden was allowed but
H not for the full sum of RM14,541,214.91 as prayed whereas the counterclaim was only allowed in part and nominal damages of RM10,000 was ordered against the named co-defendants. Hence the filing of these two appeals by the respective aggrieved parties. Following the sequence of their filing, Delta's appeal is the first one listed whereas Golden's is the second one. The third
I appeal is a consequential one which flowed from the said decision and it is in respect of the assessment of the judgment sum ordered in favour of Golden which was done by the learned deputy registrar and heard on appeal, not by the learned High Court judge who presided over the trial but by the learned judicial commissioner. Henceforth, in our judgment the first listed appeal

would be referred to as Delta's appeal, the second as Golden's first appeal and the third as Golden's second appeal.

**[2]** As shown in the intitulement of the action, Kathryn Ma who is also the mother of Neil Wong, was sued in her capacity as the personal representative, executrix and trustee of the estate of the late Datuk Wong Kie Nai ('Wong Kie Nai') who was her husband and the father of Neil Wong. Wong Kie Nai was at the material time when the cause of action in the counterclaim arose, a director of Delta.

THE CLAIM

**[3]** In gist, the claim is premised on these basic facts. Vide an agreement dated 8 April 2010 ('the agreement'), Delta appointed Golden to do maintenance works on its oil palm plantation which was situated on its two parcels of land described as Lot 24 and Lot 35, both at Mukah Land District and for a period of five years from the date thereof. That agreement was prepared by Messrs Stephen Robert & Wong Advocates. On 6 August 2013 Delta issued a letter to Golden informing it that 'a new management team has been formed and will take over management of all affairs of the Company with effect from 16th August, 2013' and Golden had to 'hand over all matters to the Senior General Manager to ensure a smooth transition'.

**[4]** Golden took this to mean that the agreement has been terminated and said so in its own letter to Delta dated 10 August 2013 and in the same letter Delta was put on notice that Golden would be moving out of the plantation on 16 August 2013. Move out they did with all their staff, labourers, workers, machineries and equipments but without Delta's presence inspite of the above mentioned notice. Delta, through Alan Nee Choong Sing ('DW6') who was Senior General Manager (Plantation Operations & Finance) of WTK Management Services Sdn Bhd only came to the plantation the following day and found it deserted.

**[5]** Why that hard stand taken by Golden although the agreement specifically states that it was for maintenance of the plantation was because, according to Golden, it had been managing the plantation since 1 March 2010 right down to the date of the impugned letter by Delta. That inaction on Delta's part was expected given that by a letter dated 14 August 2013 and in reply to Golden's letter of the 10 August 2013 as stated above, it, inter alia, had accused Golden of terminating the agreement without just cause and warned Neil Wong that he would be personally liable for all the losses and damages suffered by it, not just for the alleged breaches of the agreement but for a breach of his fiduciary duty to Delta. Golden therefore claimed the sum of RM14,541,214.91 being the amount due under the agreement, that is general

damages for loss of contract fees from 16 August 2013–7 April 2015 (which is the balance of the contract period) as well as special damages, the particulars of which are as follows:

| | | |
|---|---|---|
| (i) | Compensation and lay-off benefit paid to foreign workers | RM639,176 |
| (ii) | Working permits and transportation costs | RM65,420 |
| (iii) | Compensation and lay-off benefit paid to local workers | RM60,572 |
| (iv) | Demobilisation of equipments and machineries | RM100,000 |
| (v) | Compensation to staffs for early termination | RM52,037.25 |
| (vi) | Storage costs for the equipments and machineries from September 2013 | RM3,500 per month |
| (vii) | Security guard services from September 2013 | RM5,500 per month |

**[6]** In addition, Golden also prayed for a declaration that Delta had wrongfully terminated the agreement under the said letter, whereupon the agreement was rescinded and that Delta was also in breach of cll 5.2 and/or 12.2 of the said agreement. The said clauses read:

> 5.2 The Company shall not during the whole of the term herein provided appoint engage or contract any other persons including firms partnerships or companies to contract or carry out the Works and the Company hereby undertake to refrain from doing anything or omitting to do anything directly or indirectly which would be in breach of this term herein contained.
>
> 12.2 Notwithstanding Clause 12.1 herein provided, both parties shall be entitled to terminate this Agreement by giving 3 months prior notice in writing to the other party.

## THE DEFENCE AND COUNTERCLAIM

**[7]** Delta filed a 72 pages reamended defence and counterclaim against Neil Wong, Kathryn Ma and Golden as the first to the third defendants, respectively premised on the alleged breaches of fiduciary and statutory duties by not just Neil Wong but also the late Wong Kie Nai and prayed against the two of them, inter alia, general and exemplary damages for the said breaches. As against all three of them, what was prayed was liquidated sums being losses arising from the unlawful abandonment of the plantation such as loss of revenue from the sale of fresh fruit bunches. Against Golden, Delta also alleged it had damaged and vandalised the office equipment, furniture and fittings of Delta as well as unlawfully removing its DVR recorder. Delta therefore prayed, following the preceding payers, inter alia, that the agreement be rescinded and/or declared as null and void and that the agreement was entered in breach of ss 131(1), (5),

(7A), 132(1) and (1A) of the Companies Act 1965 ('the Companies Act'). Delta's alternative prayer, in the event the agreement was not rescinded or declared null and void, was to make both Neil Wong and Kathryn Ma personally responsible for the damages and sums claimed in the counterclaim.

**[8]** To understand and appreciate Delta's allegation of breaches of statutory and fiduciary duties, the relationship of these two companies and the persons in control of them must first be laid out. Golden had at all material times only two shareholders and they were Neil Wong and Kathryn Ma. They each held 70% and 30% of the shares in Golden, respectively. Delta also had two shareholders then — Southern Plantation Sdn Bhd and Pelita Holdings Sdn Bhd with the same percentage of shareholding, respectively as above. The Directors of Delta at the material time of Golden's appointment were as follows:

(a) Dollah Chek @ Abdullah Cik;

(b) Gangga ak Ugel;

(c) Neil Wong;

(d) Mimi Wong Hou Wai ('Mimi Wong') who is Neil Wong's sister;

(e) Datuk Wong Kie Yik ('Wong Kie Yik') who is the brother of Wong Kie Nai;

(f) Patrick Wong Haw Yeong ('Patrick Wong') who is the son of Wong Kie Yik; and

(g) Wong Kie Nai.

The first two were nominated by Pelita Holdings Sdn Bhd, a wholly owned subsidiary of Land Custody Development Authority.

**[9]** It was the late Wong Kie Nai's demise on 11 March 2013 which marked the beginning of the fallout between not just the parties in this action but also those other companies under the WTK Group of Companies for as pleaded by Golden in its statement of claim, Wong Kie Yik and his two sons Patrick Wong and Wong Kie Chie, attempted to wrest control of the WTK Group of Companies by deleting the shares of the late Wong Kie Nai's family in these companies, as well as by Delta's appointment of Wong Kie Yik as their managing director. These corporate manoeuvres led to the filing of several court actions which do not have any relevance or bearing to the appeal before us but the particulars of which are listed in para 10 of Golden's statement of claim.

**[10]** What is of relevance to us in these appeals is the fact that the agreement here was executed by Neil Wong and Kathryn Ma on behalf of Golden and Wong Kie Nai and Wong Kie Yik on behalf of Delta. The said agreement is

reproduced in Golden's Core Bundle of Documents in its first appeal from pp 1–14. That fact is equally, if not more important because therein lies the allegation of the breaches of duty in the counterclaim of Delta for it is their contention that Neil Wong had acted in breach of his aforesaid duties and had committed equitable fraud when he, inter alia, put himself in a conflict of interest position and acted in breach of his duty as trustee for the properties of Delta. As for the late Wong Kie Nai, as a director of Delta his duties just like Neil Wong were as spelt out in the various sections of the Companies Act which we had mentioned earlier and the allegation against him was that in breach of the same, he had entered into an agreement with Golden which was owned by his wife and son. What was more, pleaded Delta, he had done so without declaring his interest in Golden to Delta's Board of Directors and by these breaches he too had committed equitable fraud and acted unconscionably vis a vis Delta.

AT THE HIGH COURT

**[11]** The trial at the High Court took 25 days where 20 witnesses were called to testify. At the outset it must be pointed out that the learned High Court judge prepared three written judgments for this case. The first is titled 'Outline of Judgment' dated 24 November 2017 and the second titled 'Judgment' is dated 27 November 2017 that is three days later. However, the format of the two is almost identical. The third is titled 'Grounds of Decision' consisting of 135 pages (the last being the signing page) and dated 7 June 2019 and this was actually made available to us, that is filed in court only after the hearing of the appeals before us. We would even go to the extent of saying that the said grounds were prepared after that hearing before us because of the clear date of the said grounds of decision which is, and we stressed 7 June 2019 whereas we heard the appeal on 23 May 2019.

**[12]** It must also be mentioned that at the time when the said outline of judgment was delivered, it was never stated by the learned High Court judge that there would be a second one or that a full grounds of Her Ladyship's decision would follow suit. Given this state of affairs, we decided to fix a date for parties to appear before us to address us on the issue of the said grounds of decision. Counsel for both parties were unanimous in their view that the said grounds of decision should not be considered by us in coming to a decision in these appeals which we had *curia advisari vult* at the conclusion of their hearing. That was indeed a correct stand to adopt for otherwise, the fairer option would be for the appeals to be reheard which obviously would cause a further delay on the determination of the appeals, not to mention a waste of judicial time.

THE TWO EARLIER JUDGMENTS

**[13]** In the learned High Court judge's outline of judgment and judgment, she identified eight issues which we reproduce below but with modification as to the name of the parties to suit our own references to them in this judgment:

(a) Whether the agreement is valid?

(b) Whether the sum of RM14,541,214.91 is due and owing from Delta to Golden?

(c) In the event the agreement is invalid whether Delta is still liable to pay Golden on a quantum meruit?

(d) Whether Delta had terminated the agreement by issuing the letter dated 6 August 2013/Whether Golden had breached the agreement?

(e) Whether Golden is entitled to loss and damage resulting from the termination of the agreement?

(f) Whether Delta is entitled to the amount claimed in the counterclaim?

(g) Whether Neil Wong and Wong Kei Nai had breached their fiduciary duties?

(h) What are the consequences of the breach of fiduciary duties, if any?

**[14]** The learned High Court judge had structured these two earlier judgments along the same lines for all these issues and we would reproduce verbatim how Her Ladyship had done so in respect of the first issue but also with modification as to the names. This approach we had to take, given, with respect, the brevity of findings made by the learned High Court judge in these earlier judgments. As for the rest of the issues, we would just reproduce them with Her Ladyship's findings, as they appeared in the outline of judgment because as we said, the exact same format was used for them in the judgment:

A: Whether the agreement is valid?

Sub-Issues:

(a) Whether there is a breach of s 131 CA and Article 86 of the AA of Delta?

*Delta's arguments*: There is.
— Refer: (i) Delta's P/Submission encl 147 para 3.1 to 3.31 at pp 7–20 (ii) Delta's R/Submission encl 155 para 6.1 to 6.20 at pp 8 to 13 (iii) etc.
*Golden's arguments*: No breach
— See (i) Golden P/Submission encl 145 at para 32–47 pp 11–17 (ii) etc.
*Court's Finding*: Neil Wong and Wong Kie Nai had breached their statutory duty of disclosure under s 131 CA.

(b) Whether Delta elected to treat the Agreement as valid?
*Golden's Arguments*: Yes, Delta did.
— See (i) Golden P/Submission encl 145 at para 48–58 pp 17–23 (ii)

Golden R/Submission encl 153 para 6.1 to 6.6 pp 13 to 14 (iii) etc
*Delta's Arguments*:
— See (i) Delta's P/Submission encl 147 para 3.28 p 19.
— See (ii) Delta R/Submission encl 155 para 7.1 to 7.4 pp 13–14
— *Court's Finding*: The validity of the agreement is sure because KY had repeatedly stressed that Delta had elected to treat the agreement as valid despite the non-disclosure.

(c) Whether Golden comes within the exception in s 131(7B) CA?
'Where a contract or proposed contract is entered into in contravention of the section, the contract or proposed contract shall be voidable at the instance of the company except if it is in favour of any person dealing with the company for any valuable consideration and without any actual notice of the contravention'.
*Golden's Arguments*: Golden provided valuable consideration and did not have actual notice.
— See (i) Golden P/Submission encl 145 para 59–62 pp 23–24 (ii) Golden P/Submission encl 145 para 62–64 pp 24–25 (iii) Golden FR/Submission encl 161 para 32 to 50 pp 24 to 40 (valuable consideration) and para 51 to 53 (no actual notice) pp 24 to 43 (iv) etc.
*Delta's Arguments*:
— See Delta R/Submission encl 155 para 8.1 to 8.28 pp 14–22 (valuable consideration) and para 8.29 (actual notice) p 22.
*Court's Finding*:
Golden comes within the ambit of the s 131 (7B) exception. The agreement was voidable at the option of Delta but Delta had clearly elected to treat it as valid.

(d) Whether Delta is estopped from challenging the validity of the agreement?

*Golden's Arguments*: Delta estopped.
— See (i) Golden P/Submission encl 145 para 65–72 pp 25–28
(ii) Golden R/Submission encl 153 para 9.3 p 25)
*Delta's Arguments*:
— No submission from Delta on this.
*Court's Finding*:
Even if there was a breach of duty to disclose, as I have found, Delta had by its conduct, assented to, ratified and affirmed the agreement so as to bind itself as if there had been full disclosure. Delta is thus estopped from challenging the validity of the agreement.

**[15]** As alluded to earlier, we now reproduce, verbatim, the rest of the issues, sub-issues identified by Her Ladyship and her findings below:

B. WHETHER THE SUM OF RM14,541,214.91 IS DUE AND OWING FROM DELTA TO GOLDEN?

Sub-Issues

(a) Whether there are documentary admissions by Delta as to amount owing?

The cumulative effect of all 5 documents dispel any doubt that Delta had admitted that the amount claimed by Golden is owing to it.

We pause here to note that the five documents mentioned above are:

(a) Confirmation of balance dated 12.6.2013;

(b) Delta's letter dated 24.6.2013 signed by Wong Kie Yik;

(c) Delta's letter dated 25.3.2015;

(d) Delta's audited financial statements as at 30.9.2013;

(e) Delta's unaudited financial statements as at 30.9.2014'.

(b) whether Golden is entitled to the amount of RM14,541,214.1 admitted to be owing?

Sub-Issue:

(i) whether the works were done to the satisfaction of Delta/whether the provisions regarding certificate of approval complied with?

*Court's Finding*:

It was Delta that had failed to comply with its obligation under clause 2 of the agreement to Inspect the work done after the invoices had been submitted to it, Delta is not allowed to rely on its own failure to avoid paying Golden.

(c) whether Golden was entitled to the sums under 'debit memos' that have been included in the figure of RM14,541,214.91?

*Court's Finding*:

Golden is not entitled to the sums consisting of sums claimed under the debit memos as stated in the ledger.

Golden is entitled to the sum of RM14,541,214.91 minus the sums claimed under the debit memos.

Order: Golden is to make a computation of all the sums claimed under debit memos which shall be deducted from the sum of RM14,541,214.91.

C. IN THE EVENT THE AGREEMENT IS INVALID WHETHER DELTA IS STILL LIABLE TO PAY GOLDEN ON A QUANTUM MERUIT?

*Court's Finding*:

Even if I had found that the agreement was invalid, Golden was still entitled to the sum under B above under s 71 of Contracts Act (on a quantum meruit).

*Authority*: A claim on a quantum meruit arises when work has been done and accepted under a void contract believed to be valid (*Craven-Ellis v Canons, Ltd* [1936] 2 KB 403).

D. WHETHER DELTA HAD TERMINATED THE AGREEMENT BY ISSUING THE LETTER DATED 6 AUGUST, 2013 / CONVERSELY WHETHER GOLDEN HAD BREACHED THE AGREEMENT?

*Court's Finding*: In issuing the letter of 10.8.2013 Delta had not terminated the agreement and was not in breach of the agreement.

Rather, it was Golden that had breached the terms of the agreement by wrongfully and unilaterally abandoning Delta's plantation on 16.8.2013.

E. WHETHER GOLDEN IS ENTITLED TO LOSS AND DAMAGE RESULTING FROM THE TERMINATION OF THE AGREEMENT?

*Court's Finding*:

As Golden was the party that was in breach of the agreement it is not entitled to any compensation under s 74 of the Contract Act.

*Order*: Golden's claims for RM699,748.00 (early termination compensation to workers); RM112,220.00 (repatriation of foreign workers); RM53,722.00 (demobilization of equipment and machineries) are dismissed.

F. WHETHER DELTA IS ENTITLED TO THE AMOUNT CLAIMED IN THE COUNTERCLAIM?

(a) Whether Golden had Incurred Excessive Fertilizer Costs For The Financial Years 2011 And 2012?

*Court's Finding*:

Delta has failed to prove on balance of probabilities that Golden had incurred excessive fertilizer costs. Claim is dismissed.

(b) Whether Delta Has Proved Its Loss And Damage Arising From The Wrongful Termination By Golden?

**[16]** Under this issue three heads of losses claimed were:

(i) Production and Operation Loss;

(ii) Mills Rejection/Downgrading/Penalty; and

(iii) Fixed assets not sighted or damaged.

**[17]** The learned High Court judge said the first loss was proven as claimed in the total sum of RM5,543,520.35 but not the second one, where only RM101,607,565 for mills rejection, RM1,078.30 for mills downgrade and RM4,304.10 for quality penalty were proven. Despite the aforesaid two claims being proven as stated above, Her Ladyship however refused to allow the same on the ground that Delta had failed to mitigate its losses and damages. This was what the learned High Court judge said:

*Court's Finding*:

I find that Delta had failed to mitigate its loss and damage in so far as the production losses and rejection/downgrade/quality penalty imposed by the oil palm mills are concerned. As such Delta is not entitled to recover any part of the loss and damage under these heads as set out above.

**[18]** In respect of the third loss, in the outline of judgment, Her Ladyship states as follows:

*Court's Finding*:

This loss is not proven on balance of probabilities. *It is not allowed.* (Emphasis added.)

**[19]** However, in the judgment, Her Ladyship took a contrary stand and this is what she said:

*Court's Finding*:

This loss is not proven on balance of probabilities. *Nonetheless, Delta is entitled to nominal damages.*

*Order*: Award nominal damages at RM10,000.00 to Delta. (Emphasis added.)

**[20]** Finally, on the last issue which the learned High Court judge framed as follows:

G. WHETHER NEIL WONG AND WONG KIE NAI HAD BREACHED THEIR FIDUCIARY DUTIES?

*Court's Finding*:

I do not find that either Wong Kie Nai or Neil Wong had breached their fiduciary duties under s 132 of the Companies Act.

THE APPEAL

**[21]** Given the number of appeals heard jointly by us, it is best that we summarise the nature of each one, in particular the first two and the execution of this task is made easier by the summary of the issues in these appeals and parties' take on them as prepared by Golden's counsel. However before going into that, we need to mention two things first. One is the preliminary objection raised by Delta's counsel on the cross appeal filed by Golden contending that the appeal was against r 8(1) of the Rules of the Court of Appeal 1994. This was premised on the ground that since the appeal was on the substantive findings of the learned High Court judge that Delta had suffered production losses and was entitled to the sums as we had specified earlier for mills rejection, mills downgrade and for quality penalty, Golden should have filed a separate appeal. We dismissed the same because the cross-appeal on the said findings and that of the nominal damages of RM10,000 were all related to the counterclaim of Delta and was on the same subject matter of the reliefs granted by the learned High Court judge to Delta. Thus, we were of the view that there was no merit in the preliminary objection raised.

**[22]** Secondly, in view of the brevity of the outline of judgment and judgment of the learned High Court judge, in determining these appeals, we are guided by the Federal Court's decision in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the

court laid out that the central feature of appellate intervention is, '... to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. *In so doing, the Court of Appeal was perfectly entitled to examine the process of the evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This was reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal*. This was consistent with the established 'plainly wrong' test'. (Emphasis added.)

*Delta's appeal*

**[23]** As per their memorandum of appeal, Delta's dissatisfaction was with the learned High Court judge's judgment in:

(a) dismissing all their claims and awarding RM10,000 as nominal damages;

(b) finding that Neil Wong and Wong Kie Nai did not breach their fiduciary duties under s 132 of the Companies Act 1965;

(c) finding that Golden had not incurred excessive fertiliser cost;

(d) finding that Delta has failed to mitigate its loss and damage;

(e) dismissing Delta's claim for loss in respect of fixed assets not sighted or damaged;

(f) disallowing documents in Bundle K to be tendered as evidence; and

(g) ordering cost of RM133,000 against Delta.

*Golden's cross-appeal*

**[24]** Their grounds for appealing are:

(a) the award of nominal damages should be RM10, not RM10,000;

(b) contrary to the findings of the learned High Court judge, production losses, loose fruit production losses and ramp losses have not been proven; and

(c) contrary to the findings of the learned High Court judge, Delta was not entitled at all to losses claimed for mill rejection, mill downgrade and quality penalty imposed by the oil palm mills.

*Golden's first appeal*

**[25]** Likewise, as per their memorandum of appeal, the grounds for appealing are:

(a) the finding of the learned High Court judge that Wong Kie Nai and Neil Wong had both breached their statutory duties of disclosure under s 131 of the Companies Act;

(b) the finding of the learned High Court judge that Golden had breached the agreement by wrongfully and unilaterally abandoning the plantation;

(c) disallowing compensation to Golden under s 74 of the Contracts Act 1950 ('the Contracts Act'); and

(d) disallowing and thereby ordering deduction of the amount claimed in the debit memos from the judgment sum of RM14,541,214.91.

*Golden's second appeal*

**[26]** Golden raised nine grounds of appeal in their memorandum of appeal, the summary of which is that the learned judicial commissioner erred when he ordered the sum of RM2,434,907.83 to be deducted from the judgment sum when only the debit memos produced in 2013, amounting to RM1,228,086.75 were marked as exhibits at the trial, not those produced in 2010–2012 which formed the balance of the sum ordered to be deducted by Her Ladyship. The learned High Court judge had clearly in Her Ladyship's outline of judgment ordered that such deduction be made 'from the documents produced in court either as exhibit or as agreed documents Part B documents'. Secondly, out of the eleven debit memos produced in 2013, five had been settled and therefore should not have been computed in the deduction. Thirdly, one of the debit memos out of the said eleven was for construction of Delta's oil mill and not part of the claimed sum. Fourthly, one of the debit memos out of the said eleven was not even listed in the Ferrier Hodgson's report produced by Delta as evidence to support their calculation of the sum to be deducted and therefore it is an acknowledgement that the sum is claimable.

**[27]** In resolving the issues raised in these three appeals, particularly the first two, we find it expedient to do that by first considering this primary issue, that is whether there was repudiation of the agreement which resulted in its unlawful termination as alleged by Golden against Delta and vice-versa.

A REPUDIATION OF THE AGREEMENT

**[28]** It is of course beyond dispute from the clear words used in Recital C of the agreement (at p 111 of Delta's Core Bundle 2) that Golden's appointment was as a contractor to do maintenance works in the plantation for the said recital reads:

> C. The Company is desirous to appoint the Contractor *to undertake the maintenance works on the said Lands* which is more particularly described and set out in the Second Schedule hereto (hereinafter referred to as 'the Works') and the Contractor is desirous of accepting such appointment at the prices contained in the contract price quotation as set out in the Third Schedule hereto and upon the terms and conditions hereinafter contained. (Emphasis added.)

**[29]** Then by cl 1.2 of the agreement, Golden's position is defined as '... an independent contractor ...'. and it further provides that:

> Nothing in this Agreement shall be construed to constitute the Contractor as an agent or servant of the Company.

**[30]** However, it is equally beyond dispute, from the evidence of Delta's own witness, Helen Loh (DW1) that even before the agreement was executed in April 2010, Golden was already managing the plantation in March 2010 and this they did up to the material date, 6 August 2013. This was the scenario then because of the personality in charge of Delta at that time, that is, the late Wong Kie Nai and the evidence adduced by Golden at the trial and admitted by Delta's counsel to a certain extent orally before us, is that Golden's General Manager and first witness (PW1) that is Hii Siik Keong ('Andy Hii') was given a carte blanche, so to speak, to do just that, which was to manage the plantation. There was no evidence from Delta that another entity or person was in charge of the management of the plantation at that material time or that Golden was strictly doing maintenance work only. Further, pure logic and common sense dictate that a plantation of that size (7,000 plus hectares and employing 600 workers) required not just maintenance but management as well.

**[31]** What makes the resolution of this issue even clearer to us is that impugned letter of Delta dated 6 August 2013 (at p 123 of Delta's Core Bundle 2) addressed to Andy Hii which we reproduce in full below:

> Mr Hii Siik Kiong
> Golden Cash Harvest Sdn Bhd
> No 14 & 16
> Lorong Lanang Barat 20
> 96000 Sibu, Sarawak

6th August 2013

Dear Mr Hii,

Re: Delta-Pelita Sebakong Sdn Bhd

— Appointment of Managing Director

I refer to the above matter.

I wish to inform you that the Board of Directors has recently appointed the undersigned as its Managing Director.

Further, I wish to *inform you that a new management team has been formed and will take over management of all affairs of the Company* with effect from 16th August 2013. I hope you extend your cooperation and assistance and *hand-over all matters* to the Senior General Manager to ensure a smooth transition.

I would appreciate that you extend to the Senior General Manager all necessary cooperation and assistance.

Yours faithfully,

DELTA-PELITA SEBAKONG SDN BHD

.....

Datuk Wong Kie Yik

Managing Director

cc Board of Directors (Emphasis added.)

**[32]** In our view, the content of that letter has to be read in its totality and that means both sets of the underlined words must be read together and against the backdrop of the roles played by the parties as stated in the preceding paragraphs. Now, when the letter expressly states that Golden had to '... hand-over all matters to the Senior General Manager to ensure a smooth transition', it is equally implied and acknowledged that the management of the plantation was in Golden's hands. Otherwise there is no need to worry about a 'smooth transition' and to 'hand-over all matters', if the contract between them was strictly just for maintenance. With respect, Delta's stand that the said letter of theirs was not a termination of the maintenance agreement and that agreement was still subsisting flies in the face of the clear intention expressed in the said underlined words and background facts as alluded to earlier.

**[33]** Golden's counsel in his summary submission has also highlighted to us that even Delta's first chairman, one Abdullah Cik from Land Custody and Development Authority was also aware of the managerial role played by Golden and had no issue with it. We were not appraised of any evidence to the contrary by Delta's counsel. On the other hand, there is corroborative evidence from the concession made in the evidence of Wong Kie Yik ('DW3'), the one who drafted the said letter, that it was in breach of the spirit and intent of the agreement (see p 1197 lines 16–25 of the notes of proceeding at Vol 2(3) Part B

of Delta's appeal record). The said evidence is reproduced below:

> Q I am saying that knowing very well that Golden was managing Delta oil palm plantation since 1.3.2010, your letter dated 6.8.2013 informing Golden that a new management team has been formed and will take over the management of all affairs of Delta Pelita was in breach of the spirit and intents of the said agreement dated 8.4.2010 and in particular in clause 5.2 thereof, do you agree?
>
> A Yes.
>
> Q Do you agree?
>
> A Yes.

**[34]** In this regard, attention is also drawn to the minutes of the 19th Board of Directors' meeting on 8 April 2010 (at pp 88–93 of Delta's core bundle of documents in the second appeal) where the decision to appoint Golden was made, wherein it is stated at p 6 of the minutes as follows:

> (1) CHANGE OF CONTRACTOR
>
> As a consequence of the disposal of entire shareholding of the Company from Delta Berhad, the Company would like to terminate Delta Oil Palms Plantation Sdn. Bhd. and appoint a new contractor, Golden Cash Harvest Sdn. Bhd. *to carry out the balance development and ratification works*, maintenance and *harvesting jobs* in Delta-Pelita Sebakong Sdn. Bhd. (Emphasis added.)

**[35]** This is clear evidence that Golden's work scope was not strictly confined to maintenance of the plantation as contended by Delta.

**[36]** In arriving at this conclusion, which is contrary to that of the learned High Court judge's by considering the above mentioned facts and evidence, we were also guided by the advice made by Gopal Sri Ram, FCJ in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at para 42 on the court's role in the interpretation of contract. This was what His Lordship said:

> First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See I*nvestors Compensation Scheme Ltd v West Bromwich Building Society*; *Investors Compensation Scheme Ltd v Hopkins & Sons (a firm) & Ors*; *Alford v West Bromwich Building Society & Ors*; *Armitage v West Bromwich Building Society & Ors* [1998] 1 Al ER 98. As Lord Clyde said in Bank of *Credit and Commerce International SA (in liquidation) v Ali & Ors* [2001] 2 WLR 735:
>
> > The knowledge reasonably available to them (that is to say the parties to the

> contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to the eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.

**[37]** Our conclusion above is also reached after due consideration of the letter dated 14 August 2013 written by Wong Kie Yik to Neil Wong (at p 126 of Delta's Core Bundle 2) which accused him of acting against the best interest of Delta despite being its director, in particular the seventh paragraph which reads as follows:

> In response to your letter of 10th August 2013, you have clearly not understood the terms of the Agreement dated 8th April 2010. Clause 5.2 of the said Agreement, the only basis of your purported termination of the said Agreement only prohibits the Company from appointing or engaging persons to carry out the Works. There is no such intention on the Company's part in this regard. The Company's new management team was formed to ensure that Golden Cash Harvest Sdn Bhd fully discharges all its duties and obligations under the said Agreement. This is a matter of having in place the necessary check and balance. We have no doubt it is totally within the Company's purview and power to put in place personnel and administrative mechanism so as to ensure that there is full compliance of the said Agreement at all times by Golden Cash Harvest Sdn Bhd.

**[38]** Inspite of the stand expressed above, the irretrievable breakdown of their contractual relationship from the issuance of the letter dated 6 August 2013 was not saved because as advised by the Federal Court in *Berjaya*'s case we would have to look at the factual matrix forming the background of the transaction and in so doing, adopt an objective approach. That background is the irrefutable evidence as alluded to earlier that Golden was managing the plantation when the late Wong Kie Nai was still alive.

**[39]** As for Delta's counterclaim, we too have considered the evidence as highlighted to us by it's counsel in their written submission that Wong Kie Yik had told Helen Loh that Golden's contract was not terminated after she told him about Andy Hii asking if she knew about the letter dated 6 August 2013. She had also conveyed to Andy Hii that such was Delta's stand on it. This stand was reinforced by Wong Kie Yik's evidence that there was no such termination and Delta's wish that Golden continued with the maintenance works as agreed.

**[40]** Further, according to Delta's counsel, August 2013 was peak harvesting season and Delta would not commit financial suicide by terminating Golden's contract at that time and in urging us not to disturb the finding of the learned High Court judge on this issue, learned counsel for Delta urged us to consider the judgment of Lewison LJ in *FAGE UK Ltd and another v Chobani UK Ltd and another* [2014] EWCA Civ 5 which was quoted in this court's decision in *Ranggong ak Jenau & Ors v BLD Resources Sdn Bhd & Ors and another appeal* [2017] 5 MLJ 700; [2017] 5 MLJ 700 where His Lordship said this:

> Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applied not only to findings of primary fact, but also the evaluation of those facts and to inferences to be drawn from them. ... The reasons for this approach are many. They include:
>
> (i) The expertise of the trial judge in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> (ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> (iii) Duplication of the trial judge's role on appeal is a disproportionate use the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> (iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> (v) The atmosphere of the court room cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> (vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

**[41]** Whilst we are mindful of the above statement which states the trite law that as an appellate court we should be slow to interfere with the findings of facts made by the trial judge, but with much respect, we could not derive much assistance from the aforesaid outlines of judgment and judgment of the learned High Court judge in this case because as reproduced earlier Her Ladyship's findings then available before us were rudimentary. That was the reason why we had taken the liberty to reproduce the same exactly in its original form earlier. Therefore, also with as much respect, learned counsel for Delta could not persuade us not to embark on our own assessment of the evidence adduced at the trial in view of the brevity of learned High Court judge's reasonings and when we do that, including the evidence as raised by Delta's counsel and stated by us above, we were still not persuaded, despite Delta's insistence through its witnesses at the trial, that there was no termination of the agreement by Delta.

**[42]** We say this despite fully agreeing with Delta's counsel submission that Delta's Board of Directors has the prerogative of forming any management team as it deems fit to oversee the affairs of Delta pursuant to article 82 of its Article of Association. However, and at the risk of being overly repetitive, we again stressed that there was totally no justification for issuing that letter dated 6 August 2013 asking Golden to 'hand over all matters to the senior general manager to ensure a smooth transition'. As we had stated earlier but which we now rephrase, if it was true that Delta's intention was for Golden to continue with their maintenance contract, then why the need for that handing over? As for the financial suicide argument, just like any other suicide, the unreasonableness of it could not be used to deny its occurrence.

**[43]** Thus, we would conclude that there was wrongful repudiation of the agreement by Delta which has resulted in an unlawful termination of the agreement through no fault of Golden. The next question is whether consequentially Golden was entitled to the monetary claims prayed in their statement of claim under s 74 of the Contracts Act 1950 which we had reproduced earlier in para 5 above. We would deal with the claim for special damages first, followed by the claim of RM14,541,214.91 being the amount due under the agreement as it is tied to the debit memos which had been ordered to be deducted therefrom.

SPECIAL DAMAGES

**[44]** Before us, three heads of this damages were submitted and they are RM699,748 being payment of compensation for early termination of the agreement, RM112,220 being the cost of repatriation of its Indonesian plantation workers and RM53,722 being cost for removal of equipment and machineries from the plantation. In the written submission of Golden's counsel for its first appeal, reference was made to the documentary evidence in support of the said claims. For the first sum of RM699,748, it is at pp 112–128 of their core bundle of documents as well as p 12744 Vol 2Z (37) to p 14515 Vol 2Z (46) of their appeal record. For the sum of RM112,220, the evidence is at p 129 and for the sum of RM53,722 it is at pp 130–205, all of which are in the same core bundle of documents mentioned above.

**[45]** Delta's counsel in their written submission had rightly submitted that the burden is on Golden to prove these damages, citing the Federal Court decision in *Morello Sdn Bhd v Jacques (International) Sdn Bhd* [1995] 1 MLJ 577 and as per the words of Lord Goddard in *Bonhaus-Carter v Hyde Park Hotel Ltd* [1948] WN 89 quoted in the said decision, the plaintiff cannot just throw the particulars of the damages to the court and ask the court to give these damages. In this regard Delta's counsel has referred us to the evidence of Wong Pak Seng (PW2), Golden's estate manager who could not verify whether he

A actually paid the sum of money stated in the payment voucher to one Abdul Rahman. That voucher appears at p 112 of Golden's Core Bundle of Documents mentioned earlier. The same witness could not also verify the amount of money he received from Ling Thien Kwong (PW8), Golden's Group Senior Accounts Supervisor for the lay-off benefits to the plantation B workers, could not explain the discrepancies in the facts regarding some of the payments where the workers had actually left Sarawak before the date of the letter dated 6 August 2013 or the fact that although Golden left the plantation on 16 August 2013 but yet the payment voucher showed payments of the termination and lay-off benefits being made on 19 August 2013. In their C written submission in reply, Golden's counsel did not make a specific reply on this contention, only a two line rebuttal which we reproduce below after stating that Delta's letter of the 6 August 2013 was a repudiation of the agreement which entitles it to move out of the plantation. The said rebuttal reads:

D 46. Golden is therefore entitled to the unchallenged loss and damage suffered by it as submitted at paragraphs 30 to 36 of its Main Submissions.

**[46]** Considering the said submission at the aforesaid paragraphs and when we examined the evidence we would say, with respect that last point in learned E counsel for Delta's submission as stated above cannot be a reason for a rejection of the repatriation and lay-off benefits because firstly, there is no legal requirements that such payments be made immediately upon the workers leaving the plantation. Secondly, when we examined the said evidence of Wong Pak Seng, contrary to Delta's counsel submission, he did say at p 353 of Vol 2A F (Part B and C) of the appeal record in Golden's first appeal at lines 8–15 that he saw the cash payment being made to Abdul Rahman and at that moment he knew how much was paid to him though he had forgotten it when giving evidence at the trial. Wong Pak Seng then went on to state that he could verify the said payment because Abdul Rahman was their head contractor and was G with them for quite some time. He also explained in re-examination that Abdul Rahman was also Golden's worker and pointed out that his contract is at pp 624–625 of BB3 which was produced at the trial. As for the workers who had left before the date of the impugned letter which is 6 August 2013, Wong Pak Seng explained in re examination that in fact these workers' work passes H had expired but they had re entered Sarawak using social visit passes and then they came to the plantation to get their compensation sum and salary (see p 394 of Vol 2B of appeal record in Golden's first appeal). The fact that he could not remember the exact amount he received for the payment from Ling Thien Kwong could not be held against Golden for in fairness to Golden, Wong Pak I Seng did give a rough figure of 'a few hundred thousand' (see p 356 of the same Vol 2B).

**[47]** As for the repatriation expenses of RM112,220 it is clearly borne out by the receipt at p 129 of Golden's core bundle of documents in the first appeal

and we were not appraised of any reasons why that is not sufficient proof of the amount claimed and it should therefore be allowed.

**[48]** We do acknowledge that given the evidence and submission raised by Delta's counsel which we had stated above, it is therefore not quite right to say that the said loss and damages claimed by Golden were unchallenged. However, to say that Golden is not entitled to the damages at all would surely run counter to the documentary evidence which had not been impugned. Therefore the above-mentioned damages claimed should be allowed based on the documentary evidence produced at the trial and the reasonable explanation given by Wong Pak Seng on the alleged discrepancies in the payment.

**[49]** As for the cost for removal of the equipments and machineries, learned counsel for Delta submitted to us that Golden was not entitled to it because upon expiry of the agreement, the said cost would have to be borne by Golden in any event. There is merit in that argument and we would for that reason disallow the same. The next issue we would consider is in respect of the debit memos which is tied to the claim of general damages.

DEBIT MEMOS

**[50]** We reiterate that the sum of RM14,541,214.91 claimed as general damages by Golden consist of payments for outstanding works done under the agreement and reimbursement claims under debit memos issued by it. The sums claimed under these debit memos were for cost incurred by Golden such as those in respect of purchases of stones, fuels, labour, tools and machineries to carry out their maintenance work which were outside the scope of the work defined for them in the agreement. In their oral submission before us, it was highlighted by Delta's counsel that the debit memos were never pleaded. There is no dispute on that but evidence of them were adduced at the trial as the amount claimed of RM14,541,214.91 includes the sum in the debit memos.

**[51]** As reproduced earlier, the learned High Court judge relied on five documents to say that the amount of RM14,541,214.91 was due and owing to Golden by Delta and we are in full agreement with Her Ladyship that this was so. Delta's counsel in their written submission admitted that the said sum was in Delta's audit confirmation letter dated 25 March 2015 which in turn was based on Delta's ledger entries. However, he submitted these entries were made without scrutiny or verification — blaming the late Wong Kie Nai for his instruction to Helen Loh not to interfere with the operation of the plantation and she in turn instructed Desmond Ting Sie Kiet (DW10), Delta's account manager on this. Therefore, submitted learned counsel further, the said documentary evidence was the result of the late Wong Kie Nai's and Neil Wong's wrongful acts and breaches of their duties. Delta denied, contrary to

Golden's stand, that there had been partial or full payments of the amount stated in the debit memos issued by it previously and even if there was such payments made, Delta alleged that it was the result of Wong Kie Nai's breach of fiduciary duty. Primarily, Delta's submission is that the sum claimed in the debit memos were not within the terms of the agreement and they relied on the report from Ferrier Hodgson mentioned earlier who was commissioned by it for the trial to do a review of the agreement and to quantify Delta's losses and damages arising from the abandonment of the plantation by Golden. Further, submitted learned counsel, Golden had even charged profit of 9% on the diesel charges when the diesel should have been borne by them and even charged for diesel used by vehicles which did not belong to Delta.

**[52]** Golden's counsel, on the other hand, contended that the learned High Court judge had erred, when having found that Delta had admitted that amount claim as owing to Golden as evidenced by the five documents mentioned earlier, then contradicted herself by ordering the amount in the debit memos to be deducted although the said amount claimed was inclusive of the debit memos in the first place. We of course did not have, at the time of hearing of the appeal, Her Ladyship's reasoning on why the amount should be deducted in the first place but what is clear, notwithstanding the alleged wrong doings alleged against Wong Kie Nai and Neil Wong as aforesaid, is the fact that the amount in the debit memos have been, as found by the learned High Court judge admitted by Delta because the sum of RM14,541,214.91 includes that in the debit memos. Therefore, we would have to agree with Golden's counsel that ordering the said deduction was indeed contrary to the admission that Delta had made in the said five documents of owing Golden the amount claimed. By the said admission, Delta must surely be estopped from disputing that the said amount was owing and were expenses incurred which are related to the plantation.

**[53]** Golden has also drawn our attention to the fact that five of the debit memos which the learned judicial commissioner had considered when making the deduction (and these are listed as item 1–5 in the table of the debit memos produced in para 11 of their written submission for Golden's second appeal and totaling RM586,867.75) have been settled by Delta and should not have been deducted because they do not form part of the amount claimed. This evidence is of course relevant if we had affirmed the finding of the learned High Court judge that the deductions be made but it is just as relevant to support what we had said earlier about estoppel. Since the stand of Delta is that the sum in debit memos were not claimable under the agreement, the act of paying surely militates against that very stand. Thus, based on the considerations above, the amount of general damages claimed must be allowed in full.

BREACH OF STATUTORY DUTY

**[54]** Section 131 of the Companies Act has ten sub-sections and is a lengthy one. In view of that we would only reproduce the ones relevant to this appeal which are sub-ss (1), (5), (7A) and (7B) which reads as follows:

> 131 Disclosure of interests in contracts, property, offices, etc.
>
> (1) Subject to this section every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall, as soon as practicable after the relevant facts have come to his knowledge, declare the nature of his interest at a meeting of the directors of the company.
>
> ...
>
> (5) Every director of a company who holds any office or possesses any property whereby whether directly or indirectly duties or interests might be created in conflict with his duties or interests as director shall declare at a meeting of the directors of the company the fact and the nature, character and extent of the conflict.
>
> ...
>
> (7A) For the purpose of this section, an interest of the spouse of a director of a company (not being herself or himself a director of the company) and an interest of a child, including adopted child or stepchild, of a director of the company (not being himself or herself a director of the company) in the shares or debenture of the company, shall be treated as an interest in the contract and proposed contract.
>
> (7B) Where a contract or proposed contract is entered into in contravention of this section, the contract or proposed contract shall be voidable at the instance of the company except if it is in favour of any person dealing with the company for any valuable consideration and without any actual notice of the contravention.

**[55]** Learned counsel for Delta submitted that by the use of the word 'shall' in the first two subsections reproduced above, the obligation to declare is mandatory and cited three High Court decisions which held so, that is, *Azman Bin Jufri v Medtronic Australia Pty Ltd* [2015] 6 MLJ 841; *Beh Chun Chuan v Paloh Medical Centre Sdn Bhd & Ors* [1999] 3 MLJ 262; [1999] 7 CLJ 1 and *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973. Therefore, he said the fact that Helen Loh and all other employees of the WTK Group of Companies knew that Golden belongs to Kathryn Ma and Neil Wong, that Golden and Delta shared the same registered office from 1999–2002 and/or that Wong Kie Yik had signed the agreement on behalf of Delta are completely irrelevant on the duty to disclose given that the said provisions are mandatory. The alleged knowledge of other directors of Delta, that is, Dollah Chek @ Abdullah Cik and Gangga ak Ugel was also irrelevant, submitted learned counsel further.

**[56]** The earliest Delta's Board of Director's meeting held after the agreement

A was signed was on 8 April 2010 and it is not disputed that no such disclosure was made by Wong Kie Nai then or thereafter. In fact, submitted learned counsel for Delta, even when Helen Loh informed at that meeting about the appointment of Golden, Wong Kie Nai just kept quiet.

B **[57]** On the other hand, Golden's counsel submitted that given the undisputed fact, as admitted by Helen Loh that employees of WTK Group of Companies were aware who Golden belonged to and the sharing of the registered office of the two companies, the duty to disclose under the said s 131 does not arise in view of that knowledge. The decision of this court in *Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237 was cited in support of that contention where Gopal Sri Ram, JCA quoted the decision of the New South Wales Court of Appeal on an equipollent provision (s 123 of the Australia's Companies Act 1951) and held as follows:

D > It is true, of course, that s 123 does not merely provide for disclosure but requires the interested director to 'declare the nature of his interest'; and, as I have pointed out, sub-s (7) provides that the secretary of the company 'shall record every declaration under this section in the minutes of the meeting at which it was made'. *However, notwithstanding that this language contemplates some formality, I do not think it has the effect of requiring disclosure of facts to those who are plainly wholly aware of them.* (Emphasis added.)

**[58]** Learned counsel for Golden candidly pointed out that the above mentioned decision of this court was reversed by the Federal Court (see *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] MLJU 2225; [2010] 9 CLJ 785) but the apex court did not discuss the said s 131. That is infact true because although the said section forms the basis of one of the questions of law framed for the appeal in the Federal Court, the Federal Court decided to resolve the appeal based only on three questions of law which it considered crucial. Thus the questions were rephrased by the court but s 131 was not part of them.

**[59]** In the absence of the apex court's decision on this very section, we are inclined to adopt the decision by this court in *Genisys*'s case for it is pure common sense that one need only to disclose facts or information which form the basis of a director's interest to those who are not aware of that information or facts. It is obvious that the said section is rooted in the need to ensure transparency in the dealings by the management of the company and the moral integrity of those helming the administration of the company or as quoted in the Annotated Statutes of Malaysia which is reproduced in Golden's bundle of authorities, disclosure of potentially conflicting information is part of the commercial morality expected of company directors, and the general rule should be, when in doubt disclose. No such doubt existed here in respect of the Directors of Delta and Golden who are related by blood and the redundancy of

making such declaration does not help in achieving that purpose at all. Golden's counsel also submitted that the word 'shall' is not mandatory because under sub-s (7B), such a contract entered is voidable at the instance of the company and in this case Delta had elected to treat the agreement as valid as found by the learned High Court judge. However, with respect, we are unable to agree that is the effect of sub-s (7B). Although the law gives the wronged party the right to affirm such a contract, it does not mean that the duty to disclose is not mandatory for the effect of such non-disclosure is clearly stated. In other words, spelling out the consequence of the breach does not obliterate the mandatoriness of it. Of course, as we had concluded earlier, in the given facts of this case, the mandatoriness of that requirement has been obliterated by its own peculiar facts, that is, the close relationship and familiarity of the personalities in charge of these two companies.

**[60]** We however acknowledged that in this case there is the issue of the other two directors, that is Dollah Chek and Gangga anak Ugel who are not blood relatives to the others but Golden's counsel submitted that the fact that the plantation is the primary asset of Delta and yet none of the directors asked about Golden before appointing it as the contractor for the plantation during Delta's 19th board of directors' meeting (which we had mentioned earlier in para 26 of our judgment), is a clear indication that all Delta's directors at the meeting knew who were the shareholders and directors of Golden, its financial standing and capabilities to manage the plantation.

**[61]** The minutes of that meeting shows that it was also attended by the above-mentioned two directors and where, we stressed, the decision to appoint Golden was made. With respect, we are unable to agree with that contention of Golden for we were not appraised of any evidence that these two directors were indeed aware of the said interest of the late Wong Kie Nai. As for Wong Kie Yik's evidence at pp 1108–1109 of the Golden's appeals at Vol 2E of the appeal record, that he did not know about Golden back in the early days and its shares structure, we would not put too much weight on that evidence for the simple reason that as the evidence which we had referred to earlier shows, the two companies were sharing the same registered office and he was after all Wong Kie Nai's brother. Therefore we would have to agree with the learned High Court judge that there was indeed a breach of that statutory duty but obviously Delta had, as found by the learned High Court judge ratified the agreement, which finding Delta did not appeal against. Therefore, that ratification of the agreement by Delta militates against them.

BREACH OF S 132 OF THE COMPANIES ACT

**[62]** Delta's contention is that the learned High Court judge, having found there was a breach of s 131, should have followed through that finding by

A another finding which is a breach of s 132 of the said Act. The said s 132(1) and (1A) are reproduced below:

> 132 As to the duty and liability of officers
>
> (1) A director of a company shall at all times exercise his powers for a proper
B purpose and in good faith in the best interest of the company.
>
> (1A) A director of a company shall exercise reasonable care, skill and diligence with —
>
> (a) the knowledge, skill and experience which may reasonably be
C expected of a director having the same responsibilities; and
>
> (b) any additional knowledge, skill and experience which the director in fact has.

D **[63]** Learned counsel for Delta relied on a decision of the High Court in Singapore, that is *Van Rolls Asia Pte Ltd v Goh Boon Gay & Others* [2018] 4 SLR 1053 to say that failure by Neil Wong and the late Wong Kie Nai to disclose their interest in the agreement amounted to a breach of fiduciary duty. However, with respect, the cited case was not on failure to disclose but the act
E of the plaintiff's directors diverting customers from the plaintiff company, paying unjustified commissions and making secret profits at the expense of the company. Section 157(1) of the Companies Act of Singapore provides that a director of a company must 'at all times act honestly and use reasonable diligence in the discharge of the duties of his office' which is not quite the same
F words used in our s 132 but we do accept that it is codification of the duty of a fiduciary in common law and the facts in the cited case clearly bore out the transgression of the said provision by the first defendant in the cited case. As for this case before us, we would agree with Golden's counsel that there is no such automatic effect that a breach of s 131 would follow that under s 132. In other
G words, a breach of the former would not automatically cause a breach of the latter provision.

**[64]** However, to be fair to Delta, its allegation of breach under s 132 was also made based on the evidence of their witness, Desmond Ting Sie Kiet, who said
H that there was no fixed fee in the agreement for work under taken by Golden. Further, there was instruction from Wong Kie Nai not to interrupt Golden's operation and there should be minimal inspection of works done by it. Payments to Golden for work done were therefore made without the works being verified and without issuance of a certificate of approval as per Wong Kie
I Nai's instruction. Helen Loh confirmed that she did instruct Desmond Ting Sie Kiet to do so as can be seen from her evidence at p 1057 Vol 2(3) of the appeal record in Golden's first appeal which is reproduced below:

> Q: And the invoices and debit memo received in respect of Delta Pelita, it is the duty of Desmond Ting to check?

A: Yes but I because of Datuk KN give me instruction not to interfere with the operation in Delta Pelita. Because of that I also give standing instruction to Desmond. I did mention to him that Golden Cash Harvest is a company that belonged to Datuk Kei Nai's son so we do not query, I mean we don't question as well when we received invoice and debit note. We just accept the invoice and debit note or debit memo then we will enter into our account.

Q: So it was your instruction to Desmond Ting that whatever invoice and debit memo that comes from GCH, Desmond is not to query?

A: Yes.

**[65]** Delta's counsel thus submitted that Wong Kie Nai's and/or Neil Wong's personal interest in the agreement had led Delta to make payments to Golden without verification at rates that were arbitrarily imposed and had also caused debit memos which are not for contract fees permissible under the agreement to be issued to Delta. He concluded that it is futile for Golden to deny that Delta's rights under cll 2(d), (e) and (f) of the agreement were not protected by Wong Kie Nai and/or Niel Wong as they have clearly failed to discharge their fiduciary duties including the duty to act in the best interest of Delta. Instead, they acted against the interest of Delta.

**[66]** In this regard it is best to harken back to the words of Millet LJ in *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA) where His Lordship explained who a fiduciary is at p 18 as follows:

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of the fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

**[67]** Bearing this definition in mind, we have to say that it can immediately be seen that the failure to specify the contract fees in the agreement could not be the personal fault of the late Wong Kie Nai or Neil Wong for that matter, for the same was approved by the Board of Directors as can be seen from the resolution made at the Board of Director's meeting on 8 April 2010 wherein it is stated as follows:

A RESOLVED THAT Golden Cash Harvest Sdn Bhd be and is hereby appointed as new contractor of the Company as per terms & condition stated in the new Contractor Agreement effective 1st March 2010'. (See page 93 of Delta's Core Bunde of Documents for Appeal No 2.)

B **[68]** These debit memos were in relation to costs which arose from works or materials needed in the plantation though not those specifically mentioned in the Schedule to the agreement. With the intention not to disrupt the operation of the plantation as testified by Helen Loh and Desmond Ting Sie Kiet, but not to make profit for themselves, how could we agree that the late Wong Kie Nai
C (given that the allegation on the unverified works without issuance of the said certificate as stated above was made against him and not Neil Wong), had acted, to paraphrase s 132, for an improper purpose or in bad faith? Therefore, we are in agreement with the learned High Court judge that the allegation of
D breach of fiduciary against the late Wong Kie Nai and for that matter, Neil Wong have not been proven. Further, as stated earlier, Delta had chosen to ratify the agreement and by their said conduct could not now turn their back on it especially when the alleged principal offender, the late Wong Kie Nai, had passed away and was not able to defend himself against all these accusations.

E **[69]** Lastly, we would consider the issue on cost raised by Delta in Appeal No 1.

TRIAL COST

F **[70]** RM133,000 was awarded to Golden when RM200,000 was sought by it. Delta's contention is that none should be awarded as both parties partially lost and succeeded before the High Court at the trial. Learned counsel for Golden however submitted that given the fact that the trial proceeded for 25
G days with 20 witnesses called and the voluminous documents produced, the cost awarded by deducting one third from what they sought, to account for the fact that their claim was not allowed in full, was fair. Bearing in mind that cost was at the discretion of the learned High Court judge, but taking into account
H the complexity of the matter and the voluminous documents produced at the trial, we are minded to allow the order on cost to remain for it is indeed a fair monetary estimate of the work done in bringing this action to court.

**[71]** In conclusion, we would dismiss Delta's appeal and allow both of
I Golden's but the first one only in part with cost to Golden except for the first appeal as agreed by the parties.

*Order accordingly.*

Reported by Ashok Kumar